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21  
22 WESTERN DIVISION

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27 GUARDIAN AD LITEM, JEFFREY  
28 HAMILTON

29 Plaintiffs,  
30 v.  
31 UNITED STATES OF AMERICA,  
32 Defendant.

33 No. CV 22-02845-JLS-AFM  
34 DEFENDANT'S SUPPLEMENTAL  
35 BRIEF IN SUPPORT OF ITS PROPOSED  
36 PROTECTIVE ORDER

37 Hon. Alexander F. MacKinnon  
38 United States Magistrate Judge

1           **I. INTRODUCTION**

2           On April 11, 2023, the Court heard argument on Plaintiff's Motion for Entry of  
 3 the Model Protective Order. *See* ECF No. 52. The Court indicated that it was inclined to  
 4 enter the United States' Proposed Protective Order but would require the United States to  
 5 re-review and perform line-item designations to the confidentially designated Common  
 6 Discovery, which consists of over **400,000** pages<sup>1</sup>. *See id.* The Court provided the parties  
 7 with an opportunity for supplemental briefing. *See id.*

8           The United States strongly objects to an order requiring redesignation, given the  
 9 already exorbitant amount of time and resources spent on thoughtfully applying  
 10 document-by-document confidentiality designations and privilege assertions to what is  
 11 known as the Common Discovery by three Executive Departments and various  
 12 subcomponents.<sup>2</sup> The current version of the 63,000 document Common Discovery  
 13 package with document-by-document<sup>3</sup> confidentiality markings took numerous attorneys  
 14 from DOJ, DHS Office of General Counsel, HHS, and the DHS components (ICE, CBP,  
 15 USCIS) over **4,000** hours to compile and review. The privilege log alone is almost **1,000**  
 16 pages. It will take significantly more time to do line-by-line confidentiality markings of  
 17 the Common Discovery as this task involves complex determinations of law enforcement  
 18 sensitivity across multiple DHS components and other third party PII.

19           An order requiring line-by-line designations would defeat the purposes of

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21           <sup>1</sup> This page count is significantly underestimated because spreadsheets, which  
 22 make up a meaningful portion of the overall document count, are only counted as a  
 23 single page despite the fact that they often contain numerous tabs and/or  
 24 hundreds/thousands of lines of data. *See Declaration of Scott Falk "Falk Decl.,"* ¶ 14.

25           <sup>2</sup> *See generally* Falk Decl. (Chief Counsel for CBP); Declaration of Stephen  
 26 McCleary "McCleary Decl." (Associate General Counsel in the Office of the General  
 27 Counsel ("OGC") at DHS); Declaration of Annemarie Brennan-Linnan, "Brennan-  
 28 Linnan Decl." (Chief, District Court Litigation Division, ICE).

29           <sup>3</sup> It is important to note, that the United States did not apply a confidentiality  
 30 designation without reviewing each document. The confidentiality designations were  
 31 made on a document-by-document rather than a line-by-line basis, and only applied to  
 32 those documents that were in fact confidential. Not all documents in the Common  
 33 Discovery are designated as confidential. *See* Falk Decl. ¶ 11

1 allowing for the expedited release of a large volume of common discovery and take  
 2 substantial government resources away from producing the more important plaintiff-  
 3 specific discovery in this case. In addition, it may adversely impact the United States'  
 4 ability to proceed in other family separation cases around the country, and other matters  
 5 of national significance involving the same agencies, such as claims arising out of the  
 6 shooting at Robb Elementary School in Uvalde, Texas. *See* Falk Decl. ¶ 21.

7 Plaintiffs' request must be viewed in a larger context. Family separation cases are  
 8 proceeding throughout the country using the same or a similar protective order as the  
 9 United States has moved for in this case without issue.<sup>4</sup> In those cases, two of which  
 10 have now reached the summary judgment phase the Common Discovery's  
 11 confidentiality designations have not become an issue.<sup>5</sup>

12 The Plaintiffs have not specified how application of the current document-by-  
 13 document confidentiality designation would prejudice their case, or have any impact at  
 14 all on these proceedings, other than to cause undue delay and the United States great  
 15 expense. It is apparent from the hearing, that Plaintiffs' counsels' sole purpose for  
 16 requiring the United States to re-review the Common Discovery is based on "principle,"  
 17 rather than any actual prejudice.

18 Given the undue burden redesignation will cause, as demonstrated below, the  
 19 United States requests that the Court not require the United States to perform line-by-line  
 20 confidentiality designations for the over 400,000 pages of confidentially designated

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21       <sup>4</sup> See *A.E.S.E. et al. v. United States*, et al., No. 2:21-cv-00569 (D.N.M.); *A.F.P.*  
 22 *et. al. v. United States*, No. 1:21-at-00548 (E.D.Cal.); *A.I.I.L. et al. v. Sessions, et*  
 23 *al.*, No. 4:19-cv-00481 (D.Ariz.); *A.P.F. v. United States*, No. 2:20-cv-00065 (D.Ariz.);  
*C.M. v. United States*, No. 2:19-cv-05217 (D.Ariz.); *B.A.D.J. v. United States*, No. 2:21-  
 24 cv-00215 (D.Ariz.); *E.C.B. v. United States*, No. 2:22-cv-00915 (D.Ariz.); *E.S.M. v.*  
*United States*, No. 4:21-cv-00029 (D.Ariz.); *F.R., et al. v. United States*, No. 2:21-cv-  
 25 00339 (D.Ariz.); *P.G. et al. v. United States*, No. 4:21-cv-04457 (N.D.Cal.); *D.J.C.V. et*  
*al. v. United States*, No. 1:20-cv-05747 (S.D.N.Y.); *Benitez et al. v. Miller et al.* No.  
 3:22-cv-00884 (D. Conn.); *R.Y.M.R. et al. v. United States*, No. 1:20-cv-23598  
 (S.D.Fla.); *Nunez Euceda v. United States*, No. 2:20-cv-10793 (C.D.Cal.).

26       <sup>5</sup> While there have been challenges to privilege assertions, the Court in *A.P.F.* and  
 27 *C.M.*, noted that for the most part redactions made by the government were carefully and  
 correctly done. *See C.M.*, ECF No. 137; *see also A.P.F.*, ECF No. 136.

1 pages of Common Discovery.

## 2 II. STATEMENT OF RELEVANT FACTS

### 3 A. Background Regarding the Creation of the Common Discovery

4 To date, there are approximately 35 pending cases (the “Family Separation Cases”) across the nation, including this matter, with allegations arising out of the Zero  
 5 Tolerance Policy.<sup>6</sup> The first cases filed in federal district court were *A.P.F. et al., v.*  
 6 *United States*, No. 2:20-cv-00065-SRB (D. Ariz.) and *C.M. et al., v. United States*, No.  
 7 2:19-cv-05217-SRB (D. Ariz.). Discovery in those two cases, which relied on a similar  
 8 protective order to the one proposed in this case, is now closed.

9 The discovery in Family Separation Cases generally falls into two basic categories:  
 10 (1) policy-level discovery; and (2) plaintiff-specific discovery. The policy-level  
 11 discovery has been referred to in these cases as “Common Discovery.” Common  
 12 Discovery relates to the national, policy-related decision making of senior government  
 13 officials, as well as the implementation of those policies by officials and employees with

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15 <sup>6</sup> See *A.E.S.E. et al. v. United States*, et al., No. 2:21-cv-00569 (D.N.M.); *A.F.P.*  
 16 *et. al. v. United States*, No. 1:21-at-00548 (E.D.Cal.); *A.I.I.L. et al. v. Sessions, et*  
 17 *al., No. 4:19-cv-00481 (D.Ariz.)*; *A.P.F. v. United States*, No. 2:20-cv-00065 (D.Ariz.);  
*C.M. v. United States*, No. 2:19-cv-05217 (D.Ariz.); *Gonzales de Zuniga, et al. v. United*

18 *States*, No. 2:23-cv-00162-KRS-JHR (D.N.M.); *B.A.D.J. v. United States*, No. 2:21-cv-  
 19 00215 (D.Ariz.); *E.C.B. v. United States*, No. 2:22-cv-00915 (D.Ariz.); *E.S.M. v. United*

20 *States*, No. 4:21-cv-00029 (D.Ariz.); *F.R., et al. v. United States*, No. 2:21-cv-00339  
 21 (D.Ariz.); *J.P. et al. v. United States*, No. 2:22-cv-00683 (D.Ariz.); *M.S.E., et al. v.*  
*United States*, No. 2:22-cv-01242 (D.Ariz.); *Fuentes-Ortega et al. v. United States*, No.  
 22 2:22-cv-00449 (D.Ariz.) *B.Y.C.C. v. United States*, No. 3:22-cv-06586 (D.N.J.); *J.A.L.C.*  
*v. United States*, No. 3:22-cv-06587 (D.N.J.); *R.J.P. v. United States*, No. 3:22-cv-06588  
 23 (D.N.J.); *Caal et al. v. United States*, No. 1:23-cv-00598 (N.D.Ill.); *C.D.A., et al. v.*  
*United States*, No. 5:21-cv-00469 (E.D.Pa.); *C.M.-D.V. v. United States*, No. 5:21-cv-  
 24 00234 (W.D.Tex.); *D.A. et al. v. United States*, No. 3:22-cv-00295 (W.D.Tex.); *W.P.V.*,  
*et al. v. United States*, No. 3:23-cv-00074-DCG (W.D.Tex.); *J.R.G. et al. v. United*

25 *States*, No. 4:22-cv-05183 (N.D.Cal.); *P.G. et al. v. United States*, No. 4:21-cv-04457  
 (N.D.Cal.); *I.T. v. United States*, No. 4:22-cv-05333 (N.D.Cal.); *D.J.C.V. et al. v. United*

26 *States*, No. 1:20-cv-05747 (S.D.N.Y.); *E.L.A. et al. v. United States*, No. 2:20-cv-01524  
 (W.D.Wash.); *S.M.F. v. United States of America*, No. 2:22-cv-01193 (W.D.Wash.); *K.O.*  
*et al. v. United States*, No. 4:20-cv-12015 (D.Mass.); *Leticia et al. v. United States*, No.  
 27 1:22-cv-07527 (E.D.N.Y.); *F.C.C. v. United States*, No. 2:22-cv-05057 (E.D.N.Y.);  
*Benitez et al. v. Miller et al.* No. 3:22-cv-00884 (D. Conn.); *R.Y.M.R. et al. v. United*

28 *States*, No. 1:20-cv-23598 (S.D.Fla.); *Nunez Euceda v. United States*, No. 2:20-cv-10793  
 (C.D.Cal.); *M.A.N.H. et al. v. United States*, No. 5:23-cv-00372 (C.D.Cal.); *J.P./M.A. v.*  
*United States*, No. 23-cv-01136 (C.D.Ill.).

1 the Border Patrol Sectors, ICE Field Offices, and U.S. Attorney's Offices. *See A.I.I.L.*,  
 2 ECF No. 92 at 3.

3 The development of what has been deemed the Common Discovery began in *A.P.F.*  
 4 and *C.M.* At the time these cases were filed, the District of Arizona participated in the  
 5 Mandatory Initial Discovery Pilot Project (MIDPP). *See C.M.*, ECF No.4; *see also*  
 6 *A.P.F.*, ECF No.4. In lieu of traditional initial disclosures pursuant to Fed.R.Civ.P. 26,  
 7 the parties were required to produce "all information relevant to the parties' claims and  
 8 defenses without awaiting formal discovery requests, whether favorable or unfavorable,  
 9 and regardless of whether they intend to use the information in presenting their claims or  
 10 defenses." *See id.* at 2. Among other things, the MIDPP required the parties to develop  
 11 search terms and identify custodians for discovery of electronically stored information.  
 12 *See id.* at 6.

13 The parties in *A.P.F.* and *C.M.* spent months negotiating search terms and identifying  
 14 custodians for discovery of electronically stored information (ESI). The ESI searches  
 15 developed by the parties consisted of several dozen custodians from multiple Federal  
 16 agencies and fourteen multi-term search strings, with a date range spanning  
 17 approximately seventeen (17) months. *See C.M.*, ECF No. 69 at 3. The ESI the United  
 18 States collected initially resulted in several million pages for review. *See id.* at 3.  
 19 Through Technology Assisted Review ("TAR")<sup>7</sup>, the volume of documents was reduced  
 20 to approximately 90,000 documents. *See C.M.*, ECF No.86.

21 The Common Discovery has been refined over time and now consists of over **60,000**  
 22 **documents.**<sup>8</sup> *See P.G.*, ECF No. 73 at 6, 8. The corresponding privilege log is almost

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23       <sup>7</sup> The TAR is only used for responsiveness not for privilege or confidentiality,  
 24 which is the exceedingly more burdensome task. *See C.M.*, ECF No.5-6.

25       <sup>8</sup> A significant portion of the Common Discovery is made up of large Excel  
 26 spreadsheets that collectively contain thousands of noncitizens, non-party, names and  
 27 can be comprised of thousands of pages. *See Falk Decl.* ¶ 17; *see also* Brennan-Linnan  
 28 Decl. ¶¶ 7, 13. Excel spreadsheets cannot easily be redacted in Relativity, and must be  
 produced, and thus redacted or marked, in native format, which takes additional manual  
 review and time to complete. The Excel spreadsheets contain large amounts of  
 personally identifiable information (PII) for individuals who are not a party to this case.

(footnote cont'd on next page)

1 **1,000 pages.** The herculean task of collecting and reviewing the documents that make up  
 2 the Common Discovery took “more than 4,000 attorney-hours and countless additional  
 3 hours spent by contractors.” *See P.G.*, ECF No. 73 at 8. As an example of one agency’s  
 4 efforts, CBP’s initial review of its portion of the Common Discovery required seventeen  
 5 (17) attorneys and hundreds of hours of attorney work time, including hours worked  
 6 outside of attorneys’ regular schedule. *See Falk Decl.* at ¶ 10. Before even beginning any  
 7 substantive document review, the document review team needed to procure key fobs  
 8 from DOJ to access the document review platform and created/administered a training  
 9 module to teach each member how to review the documents. *See id.* ¶ 9. Just these initial  
 10 pre-review steps took approximately three weeks to complete. *See id.* These initial steps  
 11 will likely need to be repeated here because it has been years since this initial review,  
 12 and there is no guarantee the same contract attorneys who previously underwent this  
 13 training would be used again.

#### **B. The Privilege and Confidentiality Review of the Common Discovery**

15 The Common Discovery produced in *A.P.F.* and *C.M.* was marked in great part as  
 16 confidential at a page or document level. *See Falk Decl.* ¶ 11. This was allowed pursuant  
 17 to the protective orders issued in *C.M.* and *A.P.F.* *See C.M.*, ECF No. 58; *see also A.P.F.*,  
 18 ECF No. 45. This allowed the plaintiffs to receive more information, receive the  
 19 information more quickly, and the discovery process to remain streamlined. *See Falk*  
 20 *Decl.* ¶ 11; *see also* Brennan-Linnan Decl. ¶ 4.

21 Additionally, nothing prevented plaintiffs from asking whether a document was  
 22 confidential in whole or in part or challenging the confidentiality designations. *See*

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23 To properly designate information within these spreadsheets as confidential, either an  
 24 agency must run system checks for each individual to determine whether disclosure  
 25 would improperly reveal asylum or other protected status information; or, the agencies  
 26 would need to locate the Plaintiffs information on the spreadsheet and redact the  
 27 remaining PII. Redacting third party PII is not a fast or efficient undertaking. Agency  
 28 attorneys would need to manually perform the redactions across each spreadsheet and  
 would need to perform different redactions in each case to only reveal the information  
 relevant to each plaintiff. *See Falk Decl.* ¶ 15. ***If the Court orders redesignation, the  
 United States requests a carveout for these spreadsheets, given the burdensome nature  
 of redesignation.***

Brennan-Linnan Decl. ¶ 4. The protective orders in *C.M.* and *A.P.F.* both provide in pertinent part the following: A “Receiving Party may request the Designating Party to identify whether a Document labeled ‘CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER’ is confidential in total or only in part.” *See C.M.*, ECF No. 58 at 7, *see also A.P.F.*, ECF No. 45. There is no language suggesting that plaintiffs were required to provide any basis for this request, as read, a simple e-mail would suffice. Also, the protective orders in *C.M.* and *A.P.F.* permit the parties to seek that certain sections of documents be no longer protected by the protective order if the document needs to be used in a dispositive motion.

### **C. The Litigation Posture of Family Separation Cases to Date**

Two years have passed since the Court in *C.M.* and *A.P.F.* ordered completion of the disclosure of the policy level ESI. Since then, many more “Family Separation” cases have been filed. Given the extensive amount of time and resources already expended on production of the Common Discovery, the parties in cases entering the discovery phase opted for protective orders similar to those entered in *C.M.* and *A.P.F.* (allowing for document-by-document confidentiality designation of the Common Discovery), so that the documents could be quickly produced.<sup>9</sup>

There has been nothing to suggest that plaintiffs in other cases have been prejudiced in any way by designating documents as confidential in this manner. In fact, the number of documents that have been filed in the public record, suggests producing documents in this manner is the most efficient method of disclosure. *See Falk Decl.* ¶ 12. For instance, the parties in *C.M.* and *A.P.F.* have filed motions for summary judgment, and used 86 and 96 exhibits, respectively, out of the universe of both the Common Discovery and Plaintiff-specific documents. *See A.P.F.*, ECF Nos. 362-364; *see also C.M.*, ECF No. 371, 378-379; *Falk Decl.* ¶ 12. Although some documents remained protected by the

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<sup>9</sup> *See A.E.S.E.*, ECF No. 68; *A.F.P.* (docket is under seal); *A.I.I.L.*, ECF No. 105; *A.P.F.*, ECF No. 45; *C.M.*, ECF No. 58; *B.A.D.J.*, ECF No. 75; *E.C.B.*, ECF No. 35; *E.S.M.*, ECF No. 60; *F.R.*, ECF No. 46; *P.G.*, ECF No. 58; *D.J.C.V.*, ECF No. 112; *Benitez*, ECF No. 53; *R.Y.M.R.*, ECF No. 32; *Nunez Eceda*, ECF No. 46.

1 protective order, the parties were able to reach agreement on certain sections of some of  
2 the documents for the motions for summary judgment.

3 **D. Resources Needed to Perform Line-Item Designations**

4 It is estimated that ICE and CBP's re-review of the Common Discovery to make  
5 line-by-line confidentiality designations, would take approximately four to six months.  
6 *See Falk Decl. ¶ 13; see also Brennan-Linnan Decl. ¶ 17.* This does not include the time  
7 for subsequent layers of review by DOJ. Important to note, that this timeline comes at  
8 great expense to the resources of these agencies, other pending lawsuits, and  
9 functionality of these agencies day to day. *See Brennan-Linnan Decl. ¶ 9; see also Falk*  
10 *Decl. ¶ 18-23; McCleary Decl. ¶ 6-10.*

11 To perform such a re-review, the reviewing attorney will first need adequate  
12 training to understand what information is confidential under the terms of the protective  
13 order, and how that confidential information may appear in the Common Discovery. *See*  
14 *Falk Decl. ¶ 16; see also Brennan-Linnan Decl. ¶ 12.* To properly review and designate  
15 information such as law enforcement sensitive information, asylum, or pre-decisional  
16 and deliberative material, the attorney will need to review and evaluate the entire  
17 document in the context of an agency's operations, and potentially consult with attorneys  
18 in other agencies. *Falk Decl. ¶ 16; see also Brennan-Linnan Decl. ¶¶ 7-8.* Such  
19 confidential information is not apparent on its face and depending on the document at  
20 issue and its length, review could feasibly take several minutes per page. *Falk Decl. ¶ 16.*

21 **III. ARGUMENT**

22 There is good cause to enter the United States' proposed protective order as is,  
23 because requiring the United States to redesignate the thousands of documents  
24 previously marked confidential and redact for the deliberative process privilege, while  
25 simultaneously engaging in Plaintiff-specific discovery is unduly burdensome and will  
26 have a crippling effect on the United States resources. Courts have found good cause for  
27 blanket designations of information. *See Kristoff-Rampata v. Publix Super Markets, Inc.*,  
28 2016 WL 11431488, at \*3 (M.D. Fla. Sept. 9, 2016) ("allowing a blanket designation of

1 confidentiality for those categories will save the parties time and expense and promote  
 2 the “just, speedy, and inexpensive determination” of this case as required by Federal  
 3 Rule of Civil Procedure 1); *see also Juniper Networks, Inc. v. Bahattab*, 2008 WL  
 4 11403235, at \*3 (D.D.C. Nov. 12, 2008).

5 In *Juniper Networks*, Defendant proposed language that “[d]ocuments should not  
 6 be given a blanket designation of ‘Confidential Information;’ only confidential portions  
 7 of documents should be designated.” *See Juniper Networks*, at \*3. Plaintiff opposed the  
 8 inclusion of this section, arguing that such language imposed an undue burden on  
 9 Plaintiff because it would be required to review source code line-by-line or page-by-page  
 10 for confidentiality. *See id.* The Court found that designating confidential information on  
 11 a partial document basis, rather than a document-by-document basis, would impose an  
 12 undue burden on the parties in this case because of the nature of the voluminous  
 13 information at issue. *See id.*

14 There have been multiple instances in the Family Separation Cases suggesting  
 15 courts have found “good cause” for blanket designations or at least endorsed the benefits  
 16 of such, despite the parties stipulating to a protective order. For instance, in *P.G.*, a  
 17 Family Separation Case filed in the Northern District of California, the parties proposed  
 18 in their Joint Case Management Conference Statement to use stipulated protective orders  
 19 from *C.M.* and *A.P.F.* *See P.G.*, ECF No. 47 at 6. However, the Court directed the parties  
 20 to meet and confer and then present, through an administrative motion, a request to  
 21 modify the Northern District of California Model Protective Order. *See P.G.*, ECF No.  
 22 58 at 1. The United States provided virtually identical evidence in support of its  
 23 administrative motion in *P.G.*, as it did in this case<sup>10</sup>, to support the modifications to the  
 24 Model Protective Order. *See P.G.*, ECF No. 58, Declarations of Kenneth Brakebill and  
 25 James McConnon. The Court in *P.G.* granted the administrative motion for a protective  
 26 order allowing for blanket designations of the Common Discovery, after the parties

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27 <sup>10</sup> The United States has since provided even more evidence of good cause through  
 28 this supplemental brief.

1 justified modifications to the model protective order. *See id.*

2       In *A.I.I.L.*, the United States moved to consolidate *A.I.I.L.*, *C.M.*, and *A.P.F.* for  
 3 the limited purpose of policy-based discovery common to the Family Separation Cases  
 4 to avoid unnecessary costs, duplication of efforts, and inconsistent results. *See A.I.I.L.*,  
 5 ECF No. 92. Although U.S. District Court Judge Susan Bolton denied the request to  
 6 consolidate, Judge Bolton noted “the considerable work already done by the parties and  
 7 this Court” in *C.M.* and *A.P.F.* and acknowledged the benefit to the parties in *A.I.I.L.* in  
 8 agreeing to “consolidate their discovery in much the same way that has occurred in”  
 9 *C.M.* and *A.P.F.* and abide by the Protective Orders already in place in *C.M.* and *A.P.F.*  
 10 to “avoid unnecessary duplication.” *See A.I.I.L.*, ECF No. 101. In *Benitez et al. v. Miller*  
 11 et al. No. 3:22-cv-00884 (D. Conn.), the Court ordered the government to produce the  
 12 common discovery produced in *A.P.F.* and *C.M.* consistent with the protective orders in  
 13 those cases. *See Benitez*, ECF No.43.

14       The United States has established good cause for its proposed protective order. A  
 15 line-item review of over 400,000 pages is unduly burdensome given the multiple  
 16 categories<sup>11</sup> of protected information that can be included in any one document; it will be  
 17 difficult to obtain the necessary manpower needed due to workload and budgetary  
 18 constraints; and the training required to ensure those performing the review are  
 19 adequately protecting the information will significantly delay any re-review. *See Falk*  
 20 Decl.¶¶ 8, 12-18, 23. Moreover, the diversion of this amount of resources would  
 21 significantly impact other litigation, policies, and programs, that are being implemented  
 22 by the DOJ, DHS, and HHS. *See id.* ¶¶ 8, 19-22.

23       Additionally, while the United States is redesignating the Common Discovery, it

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24       <sup>11</sup> Information protected by provisions of the Privacy Act of 1974, 5 U.S.C § 552a;  
 25 sensitive information about CBP’s law enforcement or national security staffing,  
 26 resources, intelligence and/or methods (including the names and contact information of  
 27 third parties, and non-supervisory federal and non-federal employees); information  
 28 pertaining to applications for asylum or withholding of removal; and other information  
 restricted from disclosure, which otherwise could subject CBP to civil or criminal  
 penalties in the event of unauthorized disclosure. *See Falk*. Decl. ¶ 15.

1 will still be required to simultaneously conduct ESI searches for Plaintiff-specific  
 2 discovery and review those documents for responsiveness, privilege, and confidentiality.  
 3 This would slow down the ability to review and produce both the Common Discovery  
 4 and Plaintiff-specific discovery, further increasing the length of time it will take review  
 5 and produce discovery. *See* Brennan-Linnan Decl. ¶ 17. In *A.P.F.* and *C.M.*, tens of  
 6 thousands of Plaintiff-specific documents were collected. *See C.M.*, ECF No. 78 at 4. In  
 7 *P.G.*, 22,000 pages of Plaintiff-specific documents were produced. This case may  
 8 involve a similar amount of Plaintiff-specific documents.

9 Similar to the protective orders in *C.M.* and *A.P.F.*, the United States' proposed  
 10 protective order provides Plaintiff with the ability to ask whether a designated document  
 11 is confidential in total or only in part. Despite Plaintiffs' argument that they would be  
 12 burdened with identifying whether a document is confidential in whole or in part,  
 13 nothing suggests that Plaintiffs must provide anything more than an e-mail asking for  
 14 this information. The United States is more than willing to thoughtfully consider  
 15 requests to redesignate certain documents on a line-by-line basis as appropriate and  
 16 necessary for dispositive motions.

17 As evidenced by the filings in *C.M.* and *A.P.F.*, the universe of documents relied  
 18 upon in public filings is significantly smaller than what will be produced in discovery.  
 19 Plaintiffs fail to articulate an argument justifying the redesignation of over 400,000  
 20 pages of confidentially designated Common Discovery when it is likely that a very high  
 21 percentage of those pages/documents are irrelevant<sup>12</sup> to their case and will not be relied  
 22 on in public filings. The United States has set forth significant evidence of how an order  
 23 requiring redesignation would be extremely resource intensive and, as a result,  
 24 detrimentally impact the critical work of the departments and agencies.

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26 <sup>12</sup> There are serious concerns as to the relevance of these documents to Plaintiffs'  
 27 case. The Plaintiffs in this case were not separated because of prosecution under the Zero  
 28 Tolerance Policy. Therefore, many of the policy related documents in the Common  
 Discovery are not likely to apply in this case.

1           **IV. CONCLUSION**

2           Based on the foregoing, the United States respectfully requests this Court enter the  
3           United States' proposed protective order without a requirement to perform line-item  
4           designations to the Common Discovery. The proposed protective order already has  
5           adequate protections in place for Plaintiff to seek clarification on whether a document is  
6           confidential in total or in part and to challenge those designations.

7           Dated: April 18, 2023

Respectfully submitted,

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